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WILL CANADA BE AN OPEN DEMOCRACY AFTER MAY 2?[°]

Craig Scott *

The Context

On Monday, May 2, Canadians will vote in a federal election. It remains unclear whether the results will be significantly affected by deep concerns amongst many Canadians of authoritarian, deceitful and multifariously unethical behavior by the governing Conservative Party since becoming a minority government in 2006 (re-elected in 2008). The list of concerns is far too long to begin to summarize in this article, and I rely for present purposes on the yeoman's service of journalist [Lawrence Martin in his 2010 book *Harperland: The Politics of Control*](#). Martin does a commendable job showing exactly why and how both Canada's democracy and core public values have been threatened by the mentality, actions and game plan of Stephen Harper and his party. By extension, Martin's work makes clear what to expect (and indeed fear) should this individual ever become Prime Minister of a majority government.

A year ago, in response to Harper's prorogation of Parliament, the Nathanson Centre on Transnational Human Rights, Crime and Security held [an all-day forum](#) on oversight and accountability relating to Canada's policy of in-theatre transfers of Afghan detainees to the notoriously torture-prone National Directorate of Security in Kandahar, Member of Parliament. At that forum, Member of Parliament Bob Rae (Foreign Affairs Critic for the Liberal Party of Canada) remarked that the combination of a culture of governmental secrecy and the ineffectual mechanisms for Parliamentary scrutiny of executive conduct in Canada is basically unparalleled in leading democracies. I believe he was and remains correct.

Some evidence for this belief was published in the Government Information Quarterly at the end of 2010 in [a study by two scholars](#), Robert Hazell and Ben Worthy of the Constitution Unit of University College London. With respect to freedom of information laws and related practice, Hazell and Worthy ranked Canada last of five Westminster democracies (being Canada, New Zealand, Australia, the UK, and Ireland). My (possibly naïve) hope is that, if ever the current Conservative Party leaves office in Ottawa, the current opposition parties will make good on years of complaining about the situation and craft a legislative framework that is at least as good as the more effective aspects of the systems and practices in these other four countries. Even more optimistically, Canadians' experience of aggressive anti-transparency politics in the Harper era will provide a home-grown basis for Canada to both build on and leapfrog the quite radical reforms in New Zealand, some enlightened practice in Australia around parliamentary intelligence scrutiny, and a now-more-open Westminster, in order to set a new standard for arriving at the right transparency/secrecy constellation.

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My purpose in this article is to raise awareness of the threat to open democracy in Canada posed by the nearly pathological extent to which secrecy and manipulation of access to the truth has taken over Ottawa and Parliamentary affairs in Canada. I do this by narrating three interconnected examples of how bad things have gotten in Canada. I hasten to note that these are but three examples from a much longer list. That said, the three have not been chosen at random. What unifies them is both the context of a broken Parliamentary system faced with a resolutely all-controlling Prime Minister and a specific substantive concern. That concern is the question of why Canada's government has deliberately maintained a policy of transferring detainees in Afghanistan to Afghan intelligence services (notably, the National Directorate of Security or NDS) in full knowledge of the torture practices of those agencies and thus of the risks faced by each transferred detainee. My [working hypothesis](#) has been, and remains, that a central explanatory variable could well turn out to be that Canada's government has prioritized intelligence-gathering through coercive interrogation by NDS in order that such intelligence will later make its way to Canadian authorities to assist Canada in its war effort in Afghanistan.

The present contribution can further be read as a complement to a recently published dialogue with Dan Fata of The Cohen Group on "[Secrecy and Good Governance](#)" in which one of my points is that we generally need leaking (whether Wikileaks or other) as a mechanism for accountability in a world in which secrecy culture and instrumental politics can easily hide and cover up serious moral and legal wrongdoing. What follows further demonstrates that the need for leaking in Canada is especially acute, as long as Canada's culture and institutionalization of accountability remains so primitive and especially if a politician with the *caudillo*-esque (that is to say, political strongman) orientation of Stephen Harper again forms a government after May 2.

Whistle blowing on the whistle blowing system

For timely whistle blowing to occur, public servants have to know that whistle blowing will consistently receive effective protection. This will result in people stepping forward. More systemically, a pattern of effective protection will gradually deter some wrongful conduct from occurring in the first place.

However, in Canada, there is good reason to doubt that most public servants feel safe stepping forward. We recently had the spectacle this past December – and here, I turn to my first of three examples – of one government watchdog (namely, Canada's Auditor General, who has represented Canada's gold standard of independent scrutiny of government for a decade) in effect blowing the whistle on another government watchdog. But it was not just any watchdog on whom Auditor General Sheila Fraser blew the whistle but the watchdog who was [the Harper-appointed protector of whistle blowers](#), Public Sector Integrity Commissioner (PSIC) Christiane Ouimet. [Auditor General Fraser reported](#) that the "PSIC received a total of 114 disclosures of wrongdoing and 42 complaints of reprisal in the first two years of its operation. During this period, out of the 156 files, three formal investigations were conducted. No disclosures of wrongdoing were determined to be founded and no reprisal complaints were referred to the Tribunal." The Auditor General goes on to link these figures to the concerns of interviewed officials in Ouimet's own office, who observed that the PSIC seemed to act as if her mission were to protect government not whistleblowers.

When this report came out, a realization dawned. In the context of several years of efforts by a variety of citizens, including myself, to pry information out of the government of Canada with respect to what was and is known about torture practices in the Afghanistan agencies to whom

Canada hands over detainees, I had often found myself asking, “Why are there not more leaks from inside government on this?” The penny dropped when the Auditor General’s report on PSIC Ouimet came out: if I were a public servant contemplating whistle blowing and if I had my ear to the ground on what protection (i.e. lack of protection) I could expect, I would know that I have reason to fear reprisals. The official exposé of the PSIC by the Auditor General drove home to me just how deep the secrecy rot in Canada is.

A single sentence on torture hidden from public knowledge

As for the second example, I cannot, in the limited space we have, convey the full Kafkaesque dimensions of what follows and how it connects up with other uses of the courts by the Harper government to stall and obfuscate transparency efforts, but hopefully you will get a flavor.

Consider the following sentence in a 2006 internal report (within Canada’s Department of Foreign Affairs and International Trade / DFAIT) on the human rights situation in Afghanistan: “Extra-judicial executions, disappearances, torture, and detention without trial are all too common [in Afghanistan].” This sentence was found by the Director of Access to Information of DFAIT and, upon review, by Canada’s Information Commissioner to be a sentence that could be excluded from a release of information by the federal government to University of Ottawa Professor of Law Amir Attaran under a freedom of information request. These access-to-information officials apparently ‘reasoned’ that any relevance of the passage to the public interest (including any implications that knowledge of torture has for legal responsibility of government and government officials) was outweighed by the difficulty that the sentence would supposedly cause for Canada in its foreign relations with Afghanistan.

With reasoning like that, there is clearly a rule-of-law deficit at the level of interpretive practice. As such, there is little chance that any public servant would believe that a leak of similar information would fall within whistle blowing protection, and it is thus little wonder that there have been very few other leaks published in the past two years in Canadian newspapers in relation to the Canadian transfer-to-the-risk-of-torture practice.

Note that, when I say “other” leaks, I am referring to the fact that this particular sentence had actually already been leaked to the public after Professor Attaran had initiated litigation before the Federal Court of Canada to seek to have the information officials’ rulings overturned. In the result, the Federal Court (Kelen J.), in [*Amir Attaran v. Minister of Foreign Affairs \(Canada\)*](#), did order the above-quoted passage to be released but *only* because the offending passage had already been quoted in the reasons of another Federal Court judge in another matter and because the Globe and Mail newspaper had already published the passage. In the course of its reasoning, the Federal Court largely endorsed the root reasoning of the Access to Information officer at DFAIT and the Information Commissioner, partly on the merits and partly on the basis of adopting a deferential standard of judicial review.

Had the ‘offending’ passage not independently found its way into the public domain after Professor Attaran had started his litigation, the tenor of the judge’s reasoning was that the sentence “Extra-judicial executions, disappearances, torture, and detention without trial are all too common [in Afghanistan].” would to this day be hidden from public knowledge in Canada and Afghanistan. As it was, a number of other passages (amounting to 10% of the document, according to the judge)

were not ordered released, and we remain ignorant of whether any of them provide evidence of Canadian government knowledge that torture is “all too common” not simply in Afghanistan in general but more specifically at the hands of the National Directorate of Security to which Canada transfers captured Afghan detainees.

Ad hoc Parliamentary process that is full of holes

The third and final example should have become a live issue in the current election campaign as (well before the federal election was called) one opposition leader, the Bloc Québécois’ Gilles Duceppe, had [issued an ultimatum that set April 15 as a deadline](#) for a special documents-review process to report on the Canadian detainee-transfer practice. That ultimatum-deadline has come and gone, and it seems likely that Canadians will vote on May 2 without any further information; arbiters involved in the process [announced on April 14](#) that they refuse to release any information during an election. For present purposes, it is this special process that warrants scrutiny for what it reveals about the primitive state of Parliamentary scrutiny of executive conduct in Canada.

In late 2009, Parliament heard [revelations about torture concerns](#) within Canada’s detainee-transfer system when a career diplomat, Richard Colvin, testified before the House of Commons Special Committee on the Canadian Mission in Afghanistan. Demands were then made by the Special Committee (by virtue of the fact that opposition MPs constitute a majority on the committee) for the government to provide unredacted documents related to the affair. The government then engaged in a variety of resistance tactics including providing documents with virtually multi-page redactions.

As Canada does not have a legislative framework let alone one as robust or sophisticated as, for example, the US Congress’ powers of executive oversight, the House of Commons stepped in and adopted a resolution ordering the government to give up unredacted documents to Parliament within a range of listed subject categories. This Parliamentary order was only possible because the opposition parties could exercise their power due to having a numerical majority of MPs in a minority Parliament. In a majority-government Parliament, this recourse to the ‘will of Parliament’ would almost certainly not enter into play.

A crisis ensued. The Prime Minister prorogued Parliament in order to avoid the immediate effects of the Parliamentary order. Some months later in spring 2010, after Parliament had been reconvened, the [Speaker of the House of Commons, Peter Milliken, ruled](#) that Parliament indeed had plenary authority to order the government to provide Parliament with unredacted documents. At the same time, the Speaker welcomed and encouraged an intra-Parliament negotiated process that would strike the right balance between the government’s ongoing secrecy imperatives and the House’s transparency agenda.

The bottom-line result was that eventually two of the three opposition parties (the Official Opposition Liberal Party and the Bloc Québécois) reached an agreement with the governing Conservative Party on an ad hoc process to receive and review unredacted documents. The New Democratic Party declined to participate. Within this process, three Members of Parliament, one from each of these three parties (each with an alternate MP), receive all the documents released in accordance with the agreement. Then, those three MPs decide whether they believe the documents are both “relevant to matters of importance to Members of Parliament” and “necessary for the purpose of holding the government to account.” If they decide this dual relevance-necessity

rationale is satisfied, then the documents go to a Panel of (three) Arbiters, all being former judges (two having served on the Supreme Court of Canada). That Panel of former judges then decides whether a document can be fully released to Parliament (and thus presumably to the public) or whether it must either remain entirely secret or redacted in some way on grounds of “national defence, national security, and international relations.” The agreement provides that the “decisions of the *ad hoc* committee related to relevance shall be final and unreviewable” and “decisions of the Panel of Arbiters with respect to disclosure shall be final and unreviewable.”

This process has been in operation since early summer 2010, and – over nine months down the road – Canadians have still not heard a peep from this process.

To some this *ad hoc* committee process may appear reasonable in the circumstances of cobbling something together given the non-existent and primitive Parliamentary scrutiny system in Canada. But what needs to be known is that there are a host of problems with this process, apart from the significant delay already experienced. For example, the *ad hoc* committee not only consists of a mere three MPs but also it has no independent staff support; its support comes in the form of government staff who can be called upon to help the *ad hoc* committee understand a document’s context and to explain the reasons for secrecy from those officials’ perspective. Consider also the lack of a halfway house between the tiny *ad hoc* committee seeing the documents and all of Parliament seeing them. There is also the troubling failure of the agreement to make the same statement the decision on “necessity” being final and unreviewable as is found in the three-party agreement with respect to decisions on both “relevance” and “disclosure”; this failure gives rise to the concern that the government may treat this omission as providing a basis for seeking judicial review of combined relevance, necessity, and disclosure decisions on the basis of an argued lack of necessity.

But probably the greatest problem stems from the three-party agreement’s treatment of two categories of document. Clause 7 of the agreement provides: “The Panel of Arbiters can determine, at the request of the government, that certain information should not be disclosed due to the solicitor-client privilege. The Panel of Arbiters, after consultation with the Clerk of the Privy Council, can also determine, at the request of the government, that information constituting Cabinet confidences should not be disclosed. In both such cases, the Panel of Arbiters shall determine how information contained in the documents may be made available to Members of Parliament and the public without compromising the solicitor-client privilege or the principle of Cabinet confidentiality, by such techniques as the Panel may find appropriate, bearing in mind the basic objective of maximizing disclosure and transparency. Should the Panel of Arbiters decide that certain information should not be disclosed, the Panel will provide the rationale for its decisions to the *ad hoc* committee.” The presence of these terms in the draft agreement (terms that had not been mentioned in an earlier “agreement in principle” that all four parties that had been tabled in Parliament) caused a third opposition party, the New Democratic Party (NDP), to withdraw from the negotiations and not to sign the agreement. The NDP were furious that two entire categories of documents had in effect been added to the substantive exclusionary criteria of “national defence, national security, and international relations.”

We can only wait to see how vigorously the government seeks (or, unbeknownst to us, has already been seeking) to exclude documents related to solicitor-client privilege and Cabinet confidentiality and whether the Panel of Arbiters comes up with techniques to release certain important information notwithstanding any exclusions by the Panel of the documents themselves. What is

clear is that the very nature of the concerns about governmental and individual responsibility for sending Afghan detainees to risk of torture are such that the legal advice received by government and the reasoning of Ministers on maintaining the policy are absolutely crucial.

A more open democracy

The ultimate lesson of these three interconnected narratives is how manifestly unprepared Canada's parliamentary system is for striking the right balance between secrecy and transparency in relation to matters such as the Afghan detainee-transfer question. A well-conceived institutional framework is needed along with a re-orientation of the mindset of accountability actors (whether civil servants, courts or watchdog commissioners) away from what amounts to a presumption of secrecy and toward a strong presumption of transparency.

After the May 2 federal election, Canadians must hold all MPs' feet to the fire and demand that Canada enter a new era of a much more open democracy.